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No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

Florence Dolan,

Petitioner,

v.

City of Tigard, Oregon,

Respondent.

On Petition for Writ of Certiorari to the
Oregon Supreme Court

NATIONAL ASSOCIATION OF HOME BUILDERS AND
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE
AND BRIEF IN SUPPORT OF THE PETITION

MARY DICRESCENZO
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
Of Counsel

WILLIAM H. ETHIER
Cohn & Birnbaum P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200
Counsel of Record

STEPHANIE MCEVILY
International Council of
Shopping Centers
68 Roxen Road
Rockville Center
New York, NY 11570
Of Counsel

Attorneys For Amici Curiae

3098

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A BRIEF AMICI CURIAE

The National Association of Home Builders (NAHB) and the International Council of Shopping Centers (ICSC) respectfully move this Court for leave to file the accompanying brief amici curiae in support of Petitioner. These amici curiae have received the petitioner's written consent to file this brief and have filed the letter of consent with the Clerk of this Court. The respondent city has declined our request for consent to file a brief in support of the petition.

The NAHB represents 165,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The ICSC is the trade association of the shopping center industry. It has approximately 24,000 members worldwide and approximately 22,000 in the United States. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is, therefore, of paramount importance to these amici, both non-profit trade associations, and our members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental imposition is presented in this case by the city's demand that an individual private property owner dedicate her land for a public bike path and greenway system along a river because the landowner wishes to lawfully expand her electrical and plumbing supply business.

That a bike path and greenway system along a river are legitimate and worthwhile public desires is not the question. The question is whether the land for and construction of these public amenities must be contributed by individual private property owners, without payment therefor, who happen to own and wish to improve land that is within the government's chosen path for such facilities.

The NAHB has been before this Court either as an amicus curiae in support of or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). The NAHB and ICSC joined to file an amici curiae brief in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). The NAHB's brief was favorably cited in this Court's Nollan opinion, 483 U.S. at 840, the opinion that is at the heart of the present controversy.

The attached brief is submitted to show the dire need to resolve the question of whether land exacted by the government from an individual, as a condition for using her own private property, is an unconstitutional taking of private property when the exaction is used for a legitimate public purpose but the individual does not directly, substantially or in any other essential way contribute to the public's need to further such a purpose.

These amici sincerely believe that the accompanying brief will assist the Court in making its decision whether to grant plenary review of the issues presented in the petition. Our concerns are much broader than those of petitioner since our

members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the City of Tigard inflicts on her concerns, our brief cites authorities different from those in petitioner's brief and also addresses the broader public policy reasons why plenary review should be granted.

For the above reasons, this Motion should be granted.

Respectfully submitted,

/s/

WILLIAM H. ETHIER
Cohn & Birnbaum P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200
Counsel for Amici Curiae

November 4, 1993

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF THE <u>AMICI CURIAE</u>	1
SUMMARY OF THE REASONS FOR GRANTING THE WRIT	1
REASONS FOR GRANTING THE WRIT	4
I. THE QUESTION BEFORE THE COURT IS A SUBSTANTIAL YET UNRESOLVED FEDERAL QUESTION DESERVING OF THIS COURT'S SUPERVISION	4
A. The Substantial Advancement Prong Of The Fifth Amendment's Takings Clause, Which Ostensibly Prohibits The Type Of Permit Condition Exacted In This Case, Is In Jeopardy Of Becoming A Useless Limitation On Government Power	4
B. The City of Tigard's Land Dedication Requirement Does Not Meet The Essential Nexus Requirement This Court Established In <u>Nollan v. California Coastal Commission</u> , 483 U.S. 825 (1987)	7

TABLE OF CONTENTS
(Cont'd.)

	<u>Page</u>
II. THE QUESTION BEFORE THE COURT HAS BEEN DECIDED IN COMPLETELY INAPPOSITE WAYS BY LOWER COURTS AND CAN ONLY BE RESOLVED THROUGH FURTHER EXPLANATION BY THIS COURT	11
III. THE CITY'S ACTIONS IN THIS CASE DEMONSTRATE A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO ADMONISH GOVERNMENTS THAT THEY MUST RESPECT INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHEN REGULATING PRIVATE ACTIONS PURSUANT TO THEIR POLICE POWERS	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:	<u>Page</u>
<u>Agins v. City of Tiburon</u> , 447 U.S. 255 (1980)	4
<u>Armstrong v. United States</u> , 364 U.S. 40 (1960)	5
<u>Associated Home Builders v. City of Walnut Creek</u> , 4 Cal. 3d 633, 484 P.2d 606, <u>appeal dismissed</u> , 404 U.S. 878 (1971)	9
<u>Balch Enterprises, Inc. v. New Haven Unified School District</u> , 268 Cal. Rptr. 543 (Ct. App. 1990)	12
<u>Board of Supervisors of West Marlborough Township v. Fiechter</u> , 566 A.2d 370 (Pa. Commw. Ct. 1989)	13
<u>Castle Properties Co. v. Ackerson</u> , 558 N.Y.S.2d 334 (N.Y. Sup. Ct. 1990)	13
<u>Collis v. City of Bloomington</u> , 246 N.W.2d 19 (Minn. 1976)	17
<u>Commercial Builders of Northern California v. City of Sacramento</u> , 941 F.2d 872 (9th Cir. 1991), <u>cert. denied</u> , 112 S. Ct. 1997 (1992)	11
<u>Dolan v. City of Tigard</u> , 317 Or. 110, 854 P.2d 437 (1993)	5,6,8,11
<u>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</u> , 482 U.S. 304 (1987)	19
<u>Florida Rock Industries, Inc. v. United States</u> , 21 Cl. Ct. 161 (1990)	4
<u>Frank Ansuini, Inc. v. City of Cranston</u> , 264 A.2d 910 (R.I. 1970)	10
<u>Grupe v. California Coastal Commission</u> , 212 Cal. Rptr. 578 (Ct. App. 1985)	9
<u>Holmdel Builders Association v. Township of Holmdel</u> , 583 A.2d 277 (N.J. 1990)	12

TABLE OF AUTHORITIES
(cont'd.)

CASES:	<u>Page</u>
<u>J.E.D. Associates, Inc. v. Town of Atkinson</u> , 432 A.2d 12 (N.H. 1981)	17
<u>Keystone Bituminous Coal Association v. DeBenedictis</u> , 480 U.S. 470 (1987)	4
<u>Loveladies Harbor, Inc. v. United States</u> , 21 Cl. Ct. 153 (1990)	4
<u>Nollan v. California Coastal Commission</u> , 483 U.S. 825 (1987)	passim
<u>Park v. Watson</u> , 716 F.2d 646, 653 (9th Cir. 1983)	8,9
<u>Penn Central Transportation Co. v. City of New York</u> , 438 U.S. 104 (1978)	18
<u>Pennell v. City of San Jose</u> , 485 U.S. 1 (1988)	18
<u>Pennsylvania Coal Co. v. Mahon</u> , 260 U.S. 393 (1922)	3,19
<u>Pioneer Trust and Savings Bank v. Village of Mount Prospect</u> , 176 N.E.2d 799 (Ill. 1961)	9,10
<u>Plote, Inc. v. Minnesota Alden Co.</u> , 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981)	10
<u>Rosen v. Village of Downers Grove</u> , 167 N.E.2d 230 (Ill. 1960)	10
<u>Seawall Associates v. City of New York</u> , 542 N.E.2d 1059, 544 N.Y.S.2d 542, cert. denied, 110 S. Ct. 500 (1989)	5,13
<u>Surfside Colony, Ltd. v. California Coastal Commission</u> , 277 Cal. Rptr. 371 (Ct. App. 1991)	5,13
<u>Town of Auburn v. McEvoy</u> , 553 A.2d 317 (N.H. 1988)	17
<u>United States v. Riverside Bayview Homes</u> , 474 U.S. 121 (1985)	4

TABLE OF AUTHORITIES
(cont'd.)

CASES:	<u>Page</u>
<u>Weatherly v. Town Plan and Zoning Commission of the Town of Fairfield</u> , 579 A.2d 94 (Conn. App. 1990)	12
<u>William J. Jones Insurance Trust v. City of Fort Smith, Arkansas</u> , 731 F.Supp. 912 (W.D.Ark. 1990)	13
<u>Yee v. City of Escondido</u> , 112 S. Ct. 1522 (1992)	5
 MISCELLANEOUS:	
<u>Babcock, Forward to Exactions: A Controversial New Source For Municipal Funds</u> , 50 Law & Contemp. Problems 1 (1987)	16
<u>Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices</u> , 50 Law & Contemp. Problems 51 (1987)	15
<u>Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases</u> , 70 Neb. L. Rev. 186 (1991)	14
<u>Best, The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions</u> , 10 Zoning & Plan. L. Rep. 153 (1987)	13
<u>Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California</u> , 39 Hastings L. J. 359 (1988)	13
<u>Alexander Hamilton, The Federalist Papers</u> , No. 80 (C. Rossiter Ed. 1961)	14
<u>Daniel R. Mandelker, Land Use Law</u> (2d ed. 1988)	14
<u>Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Taking Problem</u> , 62 U. Colo. L. Rev. 599 (1991)	13
<u>Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches</u> , 39 Hastings L. J. 335 (1988)	14

TABLE OF AUTHORITIES
(cont'd.)

CASES:	<u>Page</u>
Rose, <u>Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy</u> , 71 Calif. L. Rev. 839 (1983)	16
Smith, <u>From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions</u> , 50 Law & Contemp. Problems 5 (1987)	15
Taub, <u>Exactions, Linkages, and Regulatory Takings: The Developer's Perspective</u> , 20 The Urban Lawyer 515 (1988)	16
Williams, <u>Legal Discourse, Social Vision and The Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan</u> , 59 U. Colo. L. Rev. 427 (1988)	14

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BRIEF OF THE NATIONAL ASSOCIATION OF
HOME BUILDERS AND INTERNATIONAL COUNCIL
OF SHOPPING CENTERS AS AMICI CURIAE
IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING
THE WRIT

This Court has repeatedly stated that a governmental action violates the takings clause of the Fifth Amendment if the action does not substantially advance legitimate government interests. The leading application of this prong of takings doctrine appears in Nollan v. California Coastal Commission, 483

U.S. 825 (1987). This rule is essential to guard against governmental acts that would impose on individuals costs that properly belong with the public as a whole even though the individual has not been denied all, or substantially all, economically viable use of its property.

The City of Tigard's land dedication exaction does not substantially advance its legitimate government interest in wanting a public bike path and greenway system along a river. The city justifies its land exaction through a purported but unsupported nexus between an otherwise lawful land use proposal and the city's professed need for a bike path and greenway system. The city's justification is based on mere assumptions and findings of general facts as to the burdens created by the proposed use of land and how such exactions would alleviate those burdens. While clever and imaginative, the justification is far too tenuous to pass constitutional scrutiny. If it is allowed to stand, governments at all levels will feel ever more free to contrive any nexus, no matter how flimsy, between an individual's proposed use of his or her land and the furtherance of a legitimate public purpose. Nollan's requirement for a direct, essential nexus, Id., 483 U.S. at 835 n.3, 837, will have vanished.

Additionally, while the decision below follows a few similar interpretations of the extent of Nollan's required nexus, it is directly contrary to still other courts and the greater weight of published authority, which interprets Nollan as requiring heightened scrutiny of government's claimed nexus. The growing body of case law and published thought on both sides of this important federal question requires further guidance from this Court. Moreover, from a public policy perspective alone, those suffering under the deplorable state of affairs of the land use regulatory system across the country are desperate, if not greatly anxious, for further United States Supreme Court supervision of their constitutional rights.

There is something horrific in the city's position that a merely professed nexus, i.e., between the public burdens that are

assumed to be created by a private project and the approval conditions ostensibly designed to take care of such burdens, is sufficient to deprive individuals of their private property with no compensation merely because the private owner wants to use her land in a lawful way. Something more substantial is required by the Constitution's just compensation clause. Planning for and acquiring the necessary land and capital to build adequate public facilities to support our cities and towns, such as alternative bike and pedestrian pathways and river greenways, are important governmental functions in maintaining society's quality of life. But propositions that further those ends must respect the property rights of individuals. Anything short of that proper respect, as has occurred here, is repugnant to the higher considerations expressed in the Constitution and cannot stand, at least without just compensation. The constitutional rights at issue in this case, which were not upheld below, must be reconfirmed by this Court.

These amici respectfully request the Court to grant certiorari in order to evaluate, after plenary consideration of the issues presented, the appropriate nexus required by the Constitution's takings clause in these situations. It is our hope that after the Court reviews the case it will send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION BEFORE THE COURT IS A SUBSTANTIAL YET UNRESOLVED FEDERAL QUESTION DESERVING OF THIS COURT'S SUPERVISION

A. The Substantial Advancement Prong Of The Fifth Amendment's Takings Clause, Which Ostensibly Prohibits The Type Of Permit Condition Exacted In This Case, Is In Jeopardy Of Becoming A Useless Limitation On Government Power

This Court has reiterated that a regulatory taking occurs if a government regulation either denies a property owner economically viable use of the property or does not substantially advance a legitimate government interest. Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two takings tests should be self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all, or substantially all, economically viable use of the private property.¹ Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner

¹ See, e.g., Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (While upholding the Clean Water Act's grant of jurisdiction to regulate certain wetlands, the Court noted that a property owner can still bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

economically viable use of the property but nonetheless do not substantially advance a legitimate government interest. Nollan, 483 U.S. 825; Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260 (1991); see also Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992) (Petitioners allegation that an ordinance "does not 'substantially advance' a 'legitimate state interest' . . . does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property . . ."). These two tests are an important part of this Court's effort to protect individuals in situations where it would be unfair to impose costs on an individual that properly belong with the public. See Armstrong v. United States, 364 U.S. 40, 49 (1960); Seawall Associates v. City of New York, 74 N.Y.2d 92, 107, 542 N.E.2d 1059, 1065 (1989).

The substantial advancement takings test, as applied to land use permit exactions, requires that there be an "essential nexus" between a permit condition and the burden placed on the community by the proposed land use. See Nollan, 483 U.S. at 835 n.3, 837. The issue presented, which "involves questions of federal law," Dolan v. City of Tigard, 317 Or. 110, 122, 854 P.2d 437, 444 (1993) (Peterson, J., dissenting), is whether the city's demand that the property owner dedicate land for a bike path and greenway along a river bordering her property substantially advances, in the constitutional sense, the city's legitimate interest in providing such public facilities. That is, the question involves whether there is an essential nexus between the burdens on the city that are caused by Dolan and the Dolan's permit condition. The question presented involves an essential constitutional limitation on the burgeoning growth of the regulation of the use of private land and its resolution is absolutely critical to the livelihood of the members of these amici as well as the pursuit of happiness by all property owners and those desiring to own property.

Here, the petitioner wishes to use her property in a way that lawfully expands the current business on the site for which

she is penalized by the forced dedication of her land to the public. This exaction is based solely on professed and, at best, weak assumptions made by the city's regulators as to the connection between the burdens created by the expanded use and the exaction that is supposed to resolve those burdens. This cannot be the concept of fairness and justice embodied in the Fifth Amendment. Yet the Oregon Supreme Court lets the land dedication requirement stand without just compensation upon the court's minimal review. Dolan, 317 Or. 110. If the court below is correct, then this Court's 1987 Nollan decision, after only a few years, has collapsed under the weight of lower court interpretations, and the "substantial advancement of legitimate government interests" takings test has become meaningless to property owners.

We do not propose that private property rights always rise to a constitutional level that thwarts all, or even most, legitimate public purpose regulations. Our society could not function if that were so, particularly since the legitimacy of regulations is given such great latitude and we live in an increasingly populated and closer world. But mere assumptions by government regulators, as here, or even findings of fact that are less than substantial are not sufficient to survive constitutional scrutiny if private property rights are to have any meaning in our constitutional culture. If the constitutional guarantee at issue here has any substance to it at all, surely the city must find substantial and concrete facts that prove on the record this Court's "essential nexus" before the city is allowed to take a portion of private property without compensation merely because the property owner wishes to conduct an otherwise lawful and proper use on it.

B. The City of Tigard's Land Dedication Requirement Does Not Meet The Essential Nexus Requirement This Court Established In Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

This case is very much like the Nollan case, where the Court admonished the government for its attempt to compel a property owner to contribute to the realization of an easement, even though the government "may well be right that [the easement] is a good idea." Id., 483 U.S. at 841. The Court stated in Nollan, 483 U.S. at 842, that if the government "wants an easement across the Nollans' property, it must pay for it." Similarly here, Tigard may well be right that providing a public bike and pedestrian path and a river greenway system is a good idea. But, if the city wants to provide such facilities, it must pay for it.

These amici believe this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection between the government action and both the burden the individual places on the community and the benefits the individual will receive from the government action. In examining this direct connection, i.e., the Court's "essential nexus," Nollan, 483 U.S. at 837, the Court has stated that the review requires more than the standard applied in due process or equal protection cases.

[O]ur opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, . . . not that the "State 'could rationally have decided' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original). Yet the Oregon Supreme Court says that it "does not read Nollan" as "abandon[ing] the 'reasonably related' test for a more stringent 'essential nexus' test," Dolan, 317 Or. at 120, 854 P.2d at 443, and went from there to provide an extremely deferential review of Tigard's actions, one that is equivalent to the deferential review provided to governments in due process and equal protection challenges.

In rationalizing its view of the required nexus, the Oregon Supreme Court tells us with circular logic that this Court's "essential nexus" means that an essential nexus is one that is reasonably related to an impact. Dolan, 317 Or. at 120, 854 P.2d at 443. The court below also states that this essential nexus can be found when the "exaction serves the same purpose that a denial of the permit would serve." Id. But, as in Nollan, the permit condition here cannot serve the same purpose that a development ban would achieve. The City of Tigard's purpose of acquiring a continuous and efficient bike path and greenway would not be realized by denying Dolan's land use proposal. How then would such continuous and efficient public facilities materialize? They do not exist now, and the only way the city can obtain its bike path and greenway without paying for them is to condition any land use proposal that happens to occur on the land upon which the bike path and greenway are planned. See Dolan, 317 Or. at 445-46 (Peterson, J., dissenting). The majority below does recognize that "[r]equiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," Dolan, 317 Or. at 118, 854 P.2d at 442, but that provides land owners little comfort when even the smallest and least intrusive land use proposals require governmental approvals and permits.

Finally, in support of its view that Nollan did not change the standard of review in these permit exaction cases, the Oregon Supreme Court cites to Park v. Watson, 716 F.2d 646, 653 (9th Cir. 1983). The court cites to Park v. Watson because this Court cited to Park v. Watson as the first case in a long string citation

of cases supporting this Court's view that its holding, i.e., that the easement exacted from the Nollans was not connected to any of the California Coastal Commission's professed purposes, was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." Nollan, 483 U.S. at 839. But Park v. Watson and this Court's citation of it in Nollan does not stand for the proposition that Nollan requires only a rational nexus. This Court's citation of Park v. Watson comes, of course, after the Court noted that "[w]e can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." Nollan, 483 U.S. at 838. Thus, of course the holding in Nollan would be consistent with even those cases, such as Park v. Watson, employing a deferential standard of review to find an insufficient nexus to support a permit condition.

Even more telling, the Oregon Supreme Court fails to note that the string citation in Nollan, 483 U.S. at 839-40, that begins with Park v. Watson, 716 F.2d 646, also contains citations to cases requiring a much greater nexus than one supported by a mere rational basis. See e.g., Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961).

Moreover, the Oregon Supreme Court's reliance on Park v. Watson, 716 F.2d 646, is misplaced because there the Ninth Circuit held that the condition in question violated the just compensation clause. The Ninth Circuit made a point to distinguish its review from the most deferential standard, which is used, historically at least, by the California state courts. Parks v. Watson, 716 F.2d at 653 (citing to Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 640-41, 484 P.2d 606, 611-13, appeal dismissed, 404 U.S. 878 (1971)); See also Grupe v. California Coastal Commission, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (upholding a permit condition requiring the dedication of an easement over two-thirds of a parcel that is

based on only an indirect nexus, with no benefit to the proposed single-family home).

We recognize that the takings clause may not require that land use exactions and fees be precisely tailored to the burdens and benefits attributable to the property being assessed. See, for example, the specifically and uniquely attributable test employed by some courts to evaluate impact fees. Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). That level of inquiry would approach judicial strict scrutiny of government's claimed nexus.² However, the decision below essentially equates the takings analysis with the extremely deferential nexus relationship historically used by the California state courts. This is the other extreme and should not be permitted. Also, the court below characterizes its standard of review as one based on the rational relationship test, which is typically used in a due process challenge. In takings jurisprudence, we find the deferential due process approach dangerous and insupportable in today's heavily regulated, yet still constitutional, society. The Nollan "substantial advancement" standard must require something between the deferential due process "rational basis" standard and the strict "specific and unique" relationship standard utilized by a few state courts. Otherwise, the more specific language of the takings clause would become redundant with the due process clause, and the Nollan opinion would become superfluous.

When the government requires a property owner to dedicate land there must be a direct, substantial and essential

² Cf. Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981) ("[T]he Illinois Supreme Court is currently tending toward a more liberal interpretation of the validity of exaction ordinances while maintaining the requirements of proportionality and specific attributability.").

connection to the relevant burdens imposed on the community by the owner's particular proposed land use. This connection, which should maintain the essential elements of proportionality and specific attributability, must also be supported by at least substantial evidence on the record. Otherwise, the government exaction must be accompanied by just compensation. The Oregon Supreme Court's allowance of even the most untailored nexus to withstand constitutional scrutiny is too important a federal issue to go uncorrected by this Court and deserves plenary review.

II. THE QUESTION BEFORE THE COURT HAS BEEN DECIDED IN COMPLETELY INAPPOSITE WAYS BY LOWER COURTS AND CAN ONLY BE RESOLVED THROUGH FURTHER EXPLANATION BY THIS COURT

The "substantial advancement" standard for takings doctrine outlined in Nollan, 483 U.S. at 834 n.3, has been the subject of widely divergent interpretations by lower courts. The confusion and frustration caused by such disparity of constitutional philosophy across the country cries out for correction by this Court.

To help justify its view that Nollan did not change the standard of inquiry in a "substantial advancement" takings case, the court below states that it is "not alone in interpreting Nollan in this manner." Dolan, 317 Or. at 119, 854 P.2d at 443 (citing to Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992)). The Ninth Circuit stated that it is "not persuaded that Nollan materially changes the level of scrutiny" that must be applied to the ordinance at issue. Commercial Builders, 941 F.2d at 874. The Ninth Circuit also asserted that "Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Commercial Builders, 941 F.2d at 875 (emphasis added). In other words, according to

the Ninth Circuit's reading of Nollan, only a scintilla of evidence is necessary to support a constitutional nexus. While we find the Ninth Circuit's reading of Nollan insupportable, the Oregon Supreme Court's reliance on it is even more remarkable because here there was not even a scintilla of evidence to support the city's generalized findings and assumptions about the impacts on the public caused by Dolan's proposed expansion of her business. Accord Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) (while following the extremely deferential standard of review used by the California courts, a school impact fee on commercial development was overturned because the school district did not provide any evidence to show that commercial development created the need for additional schools). There are other courts in line with the Oregon Supreme Court. See e.g., Holmdel Builders Association v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (conceptually approving the imposition of fees on commercial development for the purpose of providing affordable housing where such fees are based on a mere reasonable, or indirect and general, relationship between commercial development and the need for affordable residential development). Cf. Weatherly v. Town Plan and Zoning Commission of the Town of Fairfield, 579 A.2d 94, 98 (Conn. App. 1990), where the court, in neither citing Nollan nor reflecting any recognition of current exaction case law, upheld a dedication requirement based upon the following reasoning:

Because the imposition of subdivision controls benefits the health, safety, morals and general welfare of the community, it is an exercise of the town's police power, . . . and as such does not require the exercise of the power of eminent domain. . . . Where reasonable and impartial, a commission's power to regulate the use of land does not constitute a taking without due process of law or just compensation.

This may have been the thinking in the earlier part of this century, but today, post Nollan, it is absolutely amazing.

However, of more importance to deciding whether this case deserves plenary review, the fact that the Oregon Supreme Court is not alone must be combined with the fact that it is completely inapposite to other courts that have considered the meaning of Nollan. See, for example, Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989), in which the New York Court of Appeals stated that Nollan requires semi-strict or heightened scrutiny. Likewise, in Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371, 377 (Ct. App. 1991) (footnotes omitted), the court held that "Nollan, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." Cf. Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334 (N.Y. Sup. Ct. 1990) (right-of-way dedication requirement overturned in the absence of detailed evidence linking the development with the need for more right-of-way); William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990) (right-of-way dedication requirement is a taking because city failed to show what incremental traffic change, if any, could reasonably be expected from a convenience store's proposed land use change); Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) (right-of-way dedication requirement illegal because the record provided no evidence that the proposed development would produce the impacts requiring the dedication).

Leading authors are in line with the view that Nollan changed the standard of review to heightened scrutiny, higher than the rational relationship test employed by the Oregon Supreme Court below. Best, The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153, 156 (1987); Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L. J. 359, 380-81 (1988); Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The

Regulatory Taking Problem, 62 U. Colo. L. Rev. 599, 613 (1991); Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335, 338 (1988); See also, Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186, 210 (1991) ("It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis . . . that marks the importance of the Nollan case."); Daniel R. Mandelker, Land Use Law § 2.23 at 45 (2d ed. 1988) ("Nollan's most important holding is the heightened standard of judicial review it adopted."); Williams, Legal Discourse, Social Vision and The Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan, 59 U. Colo. L. Rev. 427, 465 (1988) ("Nollan's significance is that for the first time in nearly sixty years, a Supreme Court land use decision has trumpeted property as a fundamental right, entitled to a heightened standard of judicial review under the Constitution.").

Thus, lower courts have widely divergent opinions on when a fundamental provision of the federal Constitution requires the payment of compensation to private property owners, and the opinion of the Oregon Supreme Court below is blatantly against the greater weight of authority. This intolerable morass requires supervision. As presaged over two hundred years ago, the oversight of the federal Constitution's limitations on government power by independent courts from across the country can result in "a hydra in government from which nothing but contradiction and confusion can proceed." Alexander Hamilton, The Federalist Papers, No. 80, at 476 (C. Rossiter Ed. 1961). We ask the Court to help restrain the land use regulatory hydra by accepting the petition for review for plenary consideration.

III. THE CITY'S ACTIONS IN THIS CASE DEMONSTRATE A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO ADMONISH GOVERNMENTS THAT THEY MUST RESPECT INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHEN REGULATING PRIVATE ACTIONS PURSUANT TO THEIR POLICE POWERS

It has been a long-standing governmental practice to demand land (e.g., development exactions and land dedications) or money (e.g., impact fees and fees in lieu of dedications) from property owners who propose to build on their land. See, for example, Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Problems 51 (1987), and authorities cited therein. But

[t]he reach of subdivision exactions has significantly expanded over the years. What began as a means for preventing a subdivision from shifting to the municipality the responsibility for installing public improvements has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local governments can no longer afford.

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Problems 5, 28 (1987). In a national symposium on development exactions, Professor Babcock, the late dean of the American land use bar, cited examples of abusive exactions and followed with this discussion:

In each of these cases one can imagine the initial reaction of the "extractee" - outrage.

In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?

The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.

By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, Foreword to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Problems 1, 2 (1987). See also Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839, 841 (1983) ("[L]ocal governments cannot be trusted to deal fairly or carefully even in land decisions with only local consequences."); Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 The Urban Lawyer 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction."). Consequently, many of the demands and exactions imposed on individuals by local governments go unchallenged.

Local governments are well aware of the amount of time, money and other resources that are invested in a land use proposal even before the first application for approval is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. And when challenged, only

occasionally will courts scrutinize the exercise of this municipal leverage in ringing terms. See e.g., Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (Land dedication "far out of proportion to the needs created by his subdivision . . . [amounts to] . . . grand theft."); J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (Land dedication and fee in lieu of dedication "appears to us to be an out-and-out plan of extortion."), overruled on other grounds, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); see also Nollan, 483 U.S. at 837 (easement condition amounts to extortion). As difficult as a takings challenge is for the property owner, the just compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The Oregon Supreme Court's opinion below fatally damages this constitutional crutch.

These amici do not mean to suggest that all local governments — counties, cities and towns — are ruthless and unreasonable in conducting the affairs of their daily land use decision making processes. Many, if not most, local governments are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while it is our view that too many communities do not respect constitutional considerations for the sake of political or financial expediency, if only one community forsakes one of its citizen's rights, the constitutional damage is done and we are all worse off because of it. And that damage is exponentially magnified by judicial acceptance of it. It is exactly because of these situations that constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct the constitutional damage and restore fairness and justice to land use regulatory systems. For these amici's members, we have had enough abuse. We thought we obtained some relief with Nollan's dictates but decisions like those below point out, again, that important individual freedoms that run counter to the majority's wishes are the most evanescent of all. The types of unconstitutional permit conditions involved in this case cannot continue to crush forward. The role of the courts is to define

when the government has gone too far and insure that adequate remedies exist to redress the individual's loss. The Oregon Supreme Court failed to exercise its duty of supervision in the conflict between the public's interest and the private property owner's rights.

While the takings clause in general does not act to prohibit transfers of wealth deemed appropriate by the majoritarian branches of government, courts ought to be suspicious of governmental actions that affect a narrow class of individuals as such actions can be taken without the usual political constraints. Justice Scalia recognized this danger in Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting). Thus, when wealth is exacted from a narrow class of individuals, as here, the takings clause should wield its power to limit governmental actions.

This Court warned that it would be particularly careful about the adjective "substantial" in the substantial advancement takings test where "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Nollan, 483 U.S. at 841. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

The Court has noted that

many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to

warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987). The context of the present case is a perfect vehicle within which the Court may elaborate on and reaffirm these just compensation clause principles.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court is urged to issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully Submitted,

WILLIAM H. ETHIER
Cohn & Birnbaum P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200
Counsel for amici curiae

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